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Supreme Court, U. S.
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No. 286

IN THE

Supreme Court of the United States

OCTOBER TERM, 1938

THE UNITED STATES OF AMERICA, APPELLANT

v.

MIDSTATE HORTICULTURAL COMPANY, INC., and ARPAXAT SETRAKIAN

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BRIEF OF APPELLEES—MIDSTATE HORTICULTURAL COMPANY, INC. AND ARPAXAT SETRAKIAN

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on the Brief.

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BRIEF FOR MIDSTATE HORTICULTURAL COMPANY, INC., AND ARPAXAT SETRAKIAN—APPELLEES

Opinion Below

The opinion of the District Court, not yet reported is to be found in the Record (fols. 70-75).[1]

Jurisdiction

Appellees contend that this Court is without jurisdiction to determine the appeal.[2] By order of this Court

[1] Wherever folio references are made—reference is to Transcript of Record.

[2] Jurisdiction is claimed by the Government under Criminal Appeals Act of March 2, 1907 C.2564, 34 St. 1246 (U.S.C.A. Title 18 Sec. 682) and Section 238 of the Judicial Code, as amended by the Act of February 13, 1925 (U.S.C.A. Title 28, Sec. 345).

dated October 10, 1938 probable jurisdiction was noted upon appellees' motion to dismiss or affirm, the Court however postponing further consideration of these motions to the hearing of the case upon the merits. We again respectfully submit the lack of jurisdiction in this Court, and beg leave to refer to the original Statement Opposing Jurisdiction, the Motions to Dismiss or Affirm and the memorandums of law submitted in support thereof. The Court may of its own motion note the lack of jurisdiction, and it is respectfully submitted that any alleged defect in the motion, as contended by the government, does not affect this Court's right in this respect (Zolines Federal Appellate Jurisdiction and Procedure—3d Ed., pp. 9-10 Sec. 19—Citing Minnesota *v.* Hitchcock, 185 U. S. 373).

Question Presented

The indictment having been found in the Eastern District of Pennsylvania, does it appear that a crime has been charged and "committed" in that district within the language of Article 3 Section 2 Clause 3, and within the language of Amendment VI of the Constitution.*

Statute Involved

The crimes charged in the indictment are defined in Section 41 sub. 1 of Title 49, United States Code Annotated (Appendix, post, p. 29).

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* Constitution Article 3 Section 2 Clause 3
"The trial of all crimes * * * shall be held in the State where the said crimes shall have been committed; * * *."

Constitution Amendment VI
"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State and district wherein the crime shall have been committed. * * *"

Asterisks in citations denote omissions.

Statement

The defendant Midstate Horticultural Company, Inc. is a California corporation engaged in the business of growing, packing and shipping grapes from the State of California to various markets in other States. Its place of business is at Fresno, California. The defendant Arpaxat Setrakian is its Vice President, Secretary and General Manager (fol. 1).

On March 6th, 1937, both defendants were indicted upon 26 counts in the United States District Court for the Eastern District of Pennsylvania for soliciting, accepting and receiving rebates and concessions from the Pennsylvania Railroad Company in respect to transportations of property in interstate commerce, in violation of the Elkin's Act Sec. 41 (1) (U.S.C.A. Title 49). Each count refers to a particular carload of grapes, and except for the differences in weight, car numbers, dates of delivery, persons to whom delivery was made, the amount of freight charges, alleged rebates and the combination of carriers, each count is substantially identical in its phraseology, and substance.

We refer to Count 1 to illustrate the crime alleged. It is there charged that the defendant Midstate Horticultural Company, Inc. was at all times mentioned in the indictment a California corporation; that the defendant Arpaxat Setrakian was its Vice President, Secretary and General Manager; and that the Pennsylvania Railroad Company was a common carrier by railroad for hire (fol. 1)

Throughout the period from October 1, 1932 to December 31, 1932, the Pennsylvania Railroad Company together with other common carriers had filed with the Interstate Commerce Commission a schedule showing the rates and charges over their joint through route. Typical of the

rate, is the allegation that for grapes in lug boxes in minimum carload weights of 26,000 lbs. the charge was to be 173¢ per 100 lbs. (Count 1, fols. 2-3)

On October 15, 1932, various railroads and the Pennsylvania Railroad Company transported from Quality, California, to the Manhattan Produce Yards, in the State of New Jersey, a carload containing 882 lugs of grapes weighing 29,106 lbs. for which transportation the Pennsylvania Railroad Company collected from the defendant Midstate Horticultural Company, Inc. freight charges based on the aforesaid legal rate (fol. 3). *The full legal rate was thus collected.*•

Thereafter, it is charged, *on May 15, 1935 a rebate was solicited, received and accepted* by the defendants from the Pennsylvania Railroad Company on the aforesaid shipments, whereby the said property was transported at less than the legal rate (fol. 7).

The indictment is wholly silent as to what transpired between the period of December, 1932, the month of last delivery, and May 15, 1935, the date of solicitation and receipt of the alleged rebate. The transactions, including the completion of the transportation are not characterized by any criminal taint, but in fact are shown as entirely legal acts.

The sole reference in the indictment with respect to any act or occurrence in the Eastern District of Pennsylvania, is to the effect that during the course of the transportation from Quality, California to the Manhattan Produce Yards in New Jersey, the property passed through that district.

A motion for a bill of particulars was granted. Complying with it *the Government itself* fixed the locus of the

• Italics throughout brief supplied by counsel.

crime and **established that it was not "committed" in the Eastern District of Pennsylvania** but in the Southern District of New York. The bill of particulars filed March 21, 1938 furnished the following answer (fol. 66):

> (1. Question) *Where was the crime committed?*
>
> 1. Answer. It is assumed that defendants desire to know where the check by which payment of all rebates alleged in the 26 counts of the indictment was handed by a representative of the Pennsylvania Railroad Company to a representative of the Midstate Horticultural Company, Inc., and therefore states that the check in payment of all the rebates alleged in said 26 counts of the indictment was given by a representative of the said Railroad Company to A. Setrakian, Vice-President, Secretary, and General Manager of the Midstate Horticultural Company *in the City of New York*, State of New York. All of which was stated at the bar of the Court by Francis Biddle, Esquire, counsel for the Pennsylvania Railroad Company.

The bill of particulars stated that the rebate comprised payments for loss and damage claims of the Midstate Horticultural Company, Inc. paid without carrier liability, as a method of soliciting and receiving rebates (fol. 66).

It is significant to note that the answer to the question "Where was the crime committed?" was made by the government before the demurrer herein was filed.

On April 7th, 1938 the defendants filed their demurrer alleging among other matters that the District Court of Pennsylvania was without jurisdiction, the transportations having terminated more than two years prior to the receipt of the alleged rebate, and the place of receipt of the alleged rebate not having been alleged to have taken place within the jurisdiction of said Court. In essence

the demurrer contended that no crime was shown "committed" within the District of said Court (fols. 67-68). The demurrer was sustained after argument.

The opinion of the Court is illuminating with regard to the concession made by the Government as to the locus of the crime. Its ruling could not be otherwise, by reason of *the conceded fact that the Government itself considered the crime committed in the Southern District of New York* (Bill of Particulars, fol. 66, Opinion fols. 72-73). We here quote the opinion.

> "It is proper to mention that the *full lawful rates* were paid for the transportation of the various shipments, all of which terminated more than two years prior to the date of shipment of the alleged rebate.
>
> In an argument before the Court on the question of where *the crime took place* and the nature of the rebate, the Court ordered that a bill of particulars be filed. In reply thereto, the United States filed a bill of particulars stating • • • 'the check was in effect given by the Pennsylvania Railroad Company to Mr. Setrakian in the *City of New York* • • •.'
>
> • • • • • • •
>
> If any violation of the law *occurred as alleged*, the case should be tried *in New York*. The Court is of the opinion that under all of the facts, jurisdiction is not in this Court, and, so holding, the demurrers are sustained."

Following upon the Court's decision and the entry of an order, the appeal herein was filed by the Government.

ARGUMENT

I

No crime was shown to have been committed within the State or Eastern District of Pennsylvania, and that Court was therefore constitutionally without jurisdiction to try the same.

It is a commonplace of criminal law that an indictment which fails to allege the locus of the crime is demurrable. In the federal courts the allegation is made essential since by the Constitution a defendant can be tried only in the State and district "where the crime shall have been committed." (*Bratton* v. *U. S.*, 73 F. (2) 795, 798 and cases there cited; *Moran* v. *U. S.*, 264 F. 768. Constitution of the United States Article 3, Sec. 2, Clause 3; Amendment 6; *Beavers* v. *Henkel*, 194 U. S. 83.)

No matter how we view the indictment, two facts must be conceded by the Government. The transportations in 1932 through the Eastern District of Pennsylvania were entirely legal and lacked any criminal taint. Secondly, between 1932, when the property passed through the Eastern District of Pennsylvania, and May 15, 1935 the date on which the alleged rebate was paid in New York City, nothing whatever transpired within the jurisdiction where the indictment was found. (See Government's brief, p. 9, and indictment.)

Was a crime "committed" within the Eastern District of Pennsylvania? The determination of the question must rest ultimately upon an interpretation of the Constitutional provisions. The statutes cannot alter their effect, nor detract from the benefits conferred upon the accused. No

matter what statutory provisions may be enacted, no matter what their wording, they cannot change the Constitutional essential—that a crime must be shown to have been committed within the jurisdiction of the Court. The principle is universal. *Ex Parte Slater*, 72 Mo. 102; *State* v. *McGraw*, 87 Mo. 161; *State* v. *Hatch*, 91 Mo. 568; *State* v. *Anderson*, 191 Mo. 134; *State* v. *Dempsey*, 94 Ga. 766; *Dougan* v. *State*, 30 Ark. 41; *State* v. *Lowe*, 21 Va. 782; *Swart* v. *Kimball*, 43 Mich. 443; *Wheeler* v. *State*, 24 Wisc. 52.

The Constitutional provision serves a substantial purpose, and with that in mind, there is adequate reason for the rejection of all efforts to whittle it down to a mere form. "In the power that the newly created national courts might have to move them about to distant places for trial", the people found opportunity for fear. For that reason the Constitutional provisions were enacted (*U. S.* v. *Parker*, 19 F. Supp. 450). The expense and hardship of trial at places remote from the defendants' home furnished ample reason (*U. S.* v. *Parker*, *supra*). In *U. S.* v. *Smith*, 173 Fed. 227, page 232, the Court, refusing an order for removal, upon a failure to show the commission of a crime in the demanding jurisdiction, put the matter clearly.

> "To my mind that man has read the history of our institutions to little purpose who does not look with grave apprehension upon the possibility of the success of a proceeding such as this. If the history of liberty means anything, if constitutional guarantees are worth anything, this proceeding must fail.
>
> If the prosecuting officers have the authority to select the tribunal, if there can be more than one tribunal to select from, if the Government has that power, and can drag citizens from distant states

> to the Capital of the nation there to be tried, then as Judge Cooley says, this is a strange result of a revolution, where one of the grievances complained of was the assertion of the right to send parties abroad for trial."

The Courts have struggled with the definition of the locus of a crime. The Courts, however, have never dispensed with the need to find the crime "committed" within their jurisdiction. They may have found it by some refinement of law, but in every instance it was so found. It was never dispensed with. In *Burton* v. *United States*, 202 U. S. 344, page 389, the Court found substantially that a crime had been committed in the jurisdiction of trial within the meaning of the Constitution.

> "He sent his offer (from another State)* to St. Louis with *the intent* that it should there be accepted and consummated. Having been completed at that City on conformity with the intention of both parties, *an offense was in the eye of the law, committed there.*"

In the case on an act begun in one jurisdiction and ending at the place of trial the Court in *Re Palliser*, 136 U. S. 262, page 267, concluded:

> "But there can be no doubt at all that if an offense was committed in New York, the offense *was continued* to be committed when the letter reached the Postmaster in Connecticut; and that if no offense was committed in New York an offense *was committed* in Connecticut."

In *Moran* v. *U. S.*, 264 F. 768, page 771, the Court reversed a conviction saying:

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*Matter within brackets inserted by counsel.

> "We also think that the second instruction quoted in the earlier part of the opinion is improper, for the reason that jurisdiction was made not to depend upon the performance of any *unlawful act* within the jurisdiction of the Court below either actually or constructively."

Again in determining the locus of the crime in the case of conspiracy, the Courts when the crime of conspiracy was criminal without overt act, permitted the trial to proceed where the conspiracy was formed. When the overt act became an essential of the crime, *the place of commission* was fixed where an overt act took place (*Hyde* v. *U. S.*, 225 U. S. 347; *Shea* v. *U. S.*, 236 Fed. 97, 101; *Brown* v. *Elliot*, 225 U. S. 392). The principle has to this day remained that the prosecution may take place in either jurisdiction.

The doctrine of continuous crime has aided the Court in fixing the locus of an offense intermediate its beginning and end. But always the Court has found a crime *committed* in the jurisdiction of trial (*Brown* v. *Elliot*, 225 U. S. 392; *U. S.* v. *Kissel*, 218 U. S. 601—dealing with *continuing* conspiracies; *McBoyle* v. *U. S.*, 43 F. (2) 273; *Ventimiglia* v. *Aderhold*, 51 Fed. (2) 308—dealing with crime of transporting stolen vehicles, *a crime committed* in every State through which vehicles travel; *Smith* v. *U. S.*, 288 F. 44—dealing with mail theft). A larceny committed in one state can be prosecuted in any other state in which the proceeds are taken, because the taking into another jurisdiction is a new asportation, a continuance of the larceny. Thus again the Court finds the crime committed in the jurisdiction of trial (*Commonwealth* v. *Macloood*, 101 Mass. 1, 5, 6, 100; *People* v. *Burke*, 11 Wend. (N. Y.) 129; *Hemmaker* v. *State*, 12 M

453. See *Ex Parte Slater*, 72 Mo. 102, and cases cited in *Armour Packing Co.* v. *U. S.*, 153 F. 1). In the case of burglary, the proceeds taken into another jurisdiction will confer jurisdiction for larceny but not for burglary, since this crime is not continuing in character (*State* v. *McGraw*, 87 Mo. 161). The contention that every crime is continuous was denied in *U. S.* v. *Lombardo*, 241 U. S. 73, page 78. (See *Armour Packing Co.* v. *U. S.*, 153 F. 1, for a treatment of the various doctrines.)

In every effort of the Court to sustain jurisdiction we submit that it did, in keeping with its conscience, give effect to the explicit command of the requirements of the Constitution. It found crime committed in its presence.

It must be presumed, that it was in the view of these familiar principles and the Constitutional provisions, that Congress enacted the section of the Elkins Act. The section provides:

> "* * * (A)* Every violation of this section shall be prosecuted in any court of the United States having jurisdiction of crimes within the district in which said violation was committed (B)* or through which transportation may have been conducted, (C)* and whenever the offense is begun in one jurisdiction and completed in another it may be dealt with, inquired of, tried, determined, and punished in either jurisdiction in the same manner as if the offense had been actually and wholly committed therein." (U. S. C. A. Title 49) Sec. 41 (1).

We respectfully submit that Congress in its knowledge of the Constitution and its interpretation, proposed by this Act to provide for jurisdiction in a number of contingencies which might arise in the violation of the Elkins Act.

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*Matter in brackets by counsel.

The part of the section designated as (A) is a mere restatement of the jurisdiction of the courts in any criminal matter.

The part of the section designated (B) represents a situation wherein the arrangement for the rebate is made *prior* to or at the time of the transportation. Under such an arrangement there would be an illegal transportation in each district through which the property is transported. There we would have a situation where the transaction is tainted with criminality from the inception of the transportation, and it necessarily follows that the crime is continued throughout the transportation. It is akin to a contagion which, once begun, contaminates everything it comes in contact with.

That part of the section which we have designated as (C) provides for another situation, wherein a violation is commenced in one place, and ends in another. The offense may be punished in either of the jurisdictions in the same manner as if the offense had been actually and wholly committed therein. It is significant that Congress has seen fit to make three separate provisions in one section. If it was the intention of Congress that regardless of the facts in each case, an offense could be prosecuted in any district through which the transportation was had, no purpose would be served by the other provisions of the venue part of the section.

That this was the intention of Congress, is confirmed by the cases which have construed this provision of the act. In *Armour Packing Co.* v. *U. S.*, 209 U. S. 56, aff. 153 F. 1, the Packing Company delivered goods to the railroad in Kansas City for shipment to other parts. It paid a rate *less than the published through rate* by agreement made prior to shipment, and the shipment was transported to

its place of destination through the Western District of Missouri at the illegal rate. The prosecution of the Packing Company was had in the Western District of Missouri for violation of the Elkins Act (Title 49, Sec. 41(1)).

The Packing Company contended that the crime was complete in Kansas, and could therefore *not be committed thereafter* in Missouri. It contended that the prosecution was therefore violative of the Sixth Amendment. The argument was well taken in view of the law which had construed the Elkins Act prior to amendment. (See *Davis v. U. S.*, 104 Fed. 136.) The Court found it necessary again to establish that a crime was committed within the Western District of Missouri. It did this by applying the doctrine of continuous crime. It found that transportation as it in fact proceeded through each district was illegal and a crime at each instant. In affirming the jurisdiction of the Court it did so in conformity with constitutional demands. It did not dispense with the necessity of finding the crime committed in Missouri, merely because Congress had declared it proper to prosecute where transportation took place. On the contrary, it searched the law to find some doctrine whereby to establish that a crime in Missouri had in fact been committed, for otherwise jurisdiction would have been denied.

> "It is the purpose of the Act to punish those who give or receive transportation, in the sense of actual carriage, at a concession from the published rate. Wherever such transportation is received, there the offense is to be deemed to *have been committed.* * * * In this feature of the statute the transportation being of the essence of the offense, when it takes place, whether in one district or another, whether at the beginning, at the end or in the middle of the journey, it is equally *at all times committed.*" (p. 74)
>
> (*Armour* case, *supra.*)

In enacting the venue section, Congress intended to provide for the case of a *continuing crime.*

> "Congress doubtless had in mind that some of *these offenses* might be complete in a single district; that some might be begun in one and completed in another; and that *those* wherein actual *transportation*—actual carriage was made *an essential element* might *continue* through several districts and hence undertook to provide places for trial of an offense which might be committed against the provisions of the act." (p. 74)
>
> (*Armour* case, *supra.*)

Distinguishing the case of *Davis* v. *U. S.*, 104 Fed. 136. it held that in that case the crime was complete prior to transportation, and did not continue into the district of prosecution. (*Armour* case, *supra,* p. 75.)

The Court in construing the provision conferring jurisdiction where transportation takes place, gave the provision the limited meaning consistent with the Constitution. The Court plainly indicated its application only to a case of continuing crime. Otherwise what need was there for all of the research and reasoning of the Court. Referring to *In re Pallisers,* 136 U. S. 257, it said:

> "In that case the offender had done no act out of New York, and the acts performed by him were complete when the letter was delivered at the post office in that state; but this court held the crime to be *a continuing one.* We think the doctrine for stronger reason applies in the present case, for transportation is an essential element of the offense, and as we have said transportation equally takes place over any and all the travelled route, and during transportation the crime *is being constantly committed.* • • • The charge is of a single con-

tinuous carriage from Kansas City to New York at a concession from the legal rate for the part of the carriage between the Mississippi River and New York at 12 cents for each 100 lbs. so transferred. This is a single continuous, not a series of offenses although it is *continuously committed in each district through which the transportation is received at the prohibited rate.*" (Armour Packing Co. *v.* U. S., 209 U. S. 56, pp. 76-77.)

Mr. Justice Brewer dissented together with Chief Justice Fuller and Mr. Justice Peckham. The dissent of two of the Judges held the crime not continuous but complete at Kansas where the rebate was paid and that the prosecution violated the venue provisions of the Constitution.

The opinion of the Court below in the *Armour* case (153 Fed. 1) is enlightening for its continuous effort to find a *crime committed* within the jurisdiction of the prosecution. In it this Court will find an exposition of the various doctrines whereby the courts have, consistent with their duty, given effect to the Constitutional provisions relating to venue. The law as set out at the beginning of this argument finds ample support in the various citations of the Court. We refer the Court to the entire opinion upon this phase of this case. With regard to the nature of the offense contemplated by the Elkins Act in making the venue depend upon transportation the Court said:

"If the shipper's offense was complete in Kansas it may nevertheless *have continued and have been committed* in the Western District of Missouri also. * * * (p. 5)

* * * * * * *

A continuing offense is a *continuous unlawful* act or series of acts set afoot by a single impulse and

operated by an intermittent force, however long in time it may occupy. Where such an act or series of acts runs through several jurisdictions the offense is complete and cognizable in each. (citing cases) The transportation of the goods in this case into and through the Western District of Missouri at the *alleged illegal through rate* was the continuing operation and effect in that district of its primary cause, *the receipt of the concession and the delivery of the oil by the shipper to the carrier thereunder* for transportation. * * * (pp. 5-6)

* * * * * * *

Counsel invoke the Sixth Article of Amendments of the Constitution and the inviolable rule of the common law that every accused person shall enjoy the right to a trial in the jurisdiction *in which the offense was committed,* and the Court freely concedes and confirms the position that if the offense of the packing company *was not committed* in the Western District of Missouri the Court below was without jurisdiction of this case. * * *. If the offense was not there committed, *then Congress was undoubtedly* without power to make it there judiciable. (p. 6)

* * * * * * *

The last clause of the portion of the act quoted above (the venue provision relating to transportation)* which in addition to the Court in whose district the violation of the Act is committed, confers jurisdiction upon every other court of the United States which has criminal jurisdiction, through whose district transportation is conducted *is unconstitutional and void* if *the offense is not a continuing crime but valid and effective if it is* and that construction which validates and sustains must be preferred * * *." (p. 9)

* * * * * * *

* Matter in brackets counsel's.

"These considerations convince that the Congress intended to make and that by the provision of the act quoted it did make, the offense here charged a continuing crime indictable and punishable in every federal court having jurisdiction of crimes through whose district *the illegal transportation is conducted,* that the offense in this case is of this nature, that if the charge in the indictment is true, this offense continued in the illegal transportation it produced in and through the Western District of Missouri so that *it was there committed.* • • •" (p. 9)

(*Armour* case, 153 Fed. 1, *supra.*)

Further defining the venue section, the Court in *U. S.* v. *Lehigh Valley R. Co.,* 43 F. (2) 135 said:

"Under the Elkin's Act the principal was committing the offense in the district through which the transportation was conducted *at the time when it was conducted.*" (p. 144)

That the search is not for a fictional locus of the commission of crime but for the locus of its actual commission, is illustrated by the case of *New York Central* v. *H. R. R. Co.* v. *U. S.,* 166 Fed. 267, reversing, 153 F. 630. There the Court in defining the provision which permits venue in either the place of commencement or consummation of crime, distinguished between an act lawfully begun and an unlawful act following a completed lawful act. That principle is controlling upon the facts of the instant case, wherein it must be conceded that at least the transportation from beginning to completion was without criminal taint and entirely legal. The case also establishes that the transportation provision of the venue section does not apply to every type of offense defined by Sec. 41 (1) of the Act.

> "This provision applies to a continuing offense—a *continuous unlawful* act or series of acts set in foot by a single impulse and operated by an intermittent force, however long a time it may occupy. Where such an act or series of acts runs through several jurisdictions the offense is committed and cognizable in each.
>
> • • • • • • •
>
> *"The distinction is between a continuous unlawful act and an unlawful act following a completed lawful act."*
>
> (*N. Y. Central & H. R. R. Co.* v. *U. S. supra.*)

That we are correct in our conclusion that the venue provision of the Elkin's Act requires as a condition of jurisdiction the presence of a continuous crime is emphasized by the holding in the case of *Ventimiglia* v. *Aderhold,* 51 F. (2) 308, wherein the Court in construing a similar provision held:

> "The last clause providing that any person may be punished in any district through which the vehicle has been transported is properly applicable to the offense of transporting a stolen automobile in interstate commerce and is valid because *the offense is actually* committed in any district through which the automobile is being transferred; but this clause cannot apply to the sale of such automobile unless the sale was made in the district where the crime is being prosecuted without rendering such clause unconstitutional to that extent."

The conclusion warranted by a review of these authorities is that a distinction must be made between two cases. The first is where at the inception an unlawful agreement as to rebate is made and an illegal rate paid. The second case is where, at the inception the transactions, including

the completion of transportation are legal, with no criminal intent, but where at some subsequent time, a rebate not contemplated at the inception is procured. In the former case the crime is a continuing one through every jurisdiction of transportation and within the principle of the *Armour* cases *supra* the venue is properly laid in any district of transportation. This is in accord with the constitutional requirement that a crime be tried *where committed*. In the latter case no crime, upon any legal doctrine, can be shown to have been committed prior to the date of rebate. The transportation therefore being then an accomplished legal fact, can furnish no jurisdiction, unless it be the same locality wherein the rebate was paid. The result flows from the fact that no crime can be shown committed in such a case where and when the transportation took place. That is the constitutional test.

These authorities definitely commit the Government to the need of establishing within the meaning of the Constitution that a crime was committed within the Eastern District of Pennsylvania. It cannot seek solace merely in the words of the statute. The latter cannot alter the organic act.

The Government has conceded by the indictment, and the bill of particulars that the first alleged unlawful act was the furnishing of a rebate *at the City of New York* on May 15 1935. It is also conceded that the transportation was complete in December of 1932: that it was then, entirely legal, and that nothing transpired until May 15, 1935 to make it illegal. The sole transaction within the jurisdiction of the Court of the Eastern District of Pennsylvania was an act of transportation in December 1932.

The Law Applied to the Facts of the Case

We see but one way whereby the Government may argue the commission of a crime within the District. It must by a doctrine of relation back, attach the alleged criminal act of rebate conceived on May 15, 1935 in the City of New York to the act of transportation completed in December, 1932 in the Eastern District of Pennsylvania. Unlike the *Armour* cases it must look backward, rather than forward, making a crime operate continuously backward tainting with criminality legal acts preceding it in time. We cannot believe that this Court would accept so artificial a doctrine, in the law of crimes. A court cannot by construction make a crime. (*Merrich* v. *Porter*, 10 Pac. (2) 138; *Bradley* v. *State*, 84 So. 677 (Fla.); *The State* v. *Moore*, 12 N. H. 42.)

> "An act that is not prohibited and made punishable either by the common law or by statute or ordinance *both* at the time of its commission and at the time it is sought to punish therefore cannot be punished as a crime, and the court cannot by construction make that a crime which is not so prohibited." (Corpus Juris, p. 65, §22)

The criminal character of a transaction is to be determined by the conditions existing at that time. (*Norton* v. *U. S.*, 205 Fed. 593, 603; *U. S.* v. *Dietrich*, 126 Fed. 665; *U. S.* v. *Fox*, 95 U. S. 670.) The intent with which an accused does a subsequent act cannot be imputed to him as of a prior date of the crime charged.

> "In coming to your conclusion, you must bear in mind that if one not in solvent circumstances should ask credit or order goods without the present means of paying for them, this by itself is not

fraudulent; nor would it come within the meaning of this section, if one had ordered goods and afterwards devised a purpose of escaping from paying for it."

(*U. S.* v. *Wooten*, 29 Fed. 702.)

The doctrine of relation, or trespass *ab initio* has no application to the criminal law. (*State* v. *Hatch*, 91 Missouri 568; *Milton* v. *State of Florida*, 40 Fla. 250; *Commonwealth* v. *Tobin*, 108 Mass. 426; *The State* v. *Moore*, 12 N. H. 42.)

State v. *Hatch*, 91 Missouri, 568, 570:

"The doctrine of relation does not apply to criminal cases."

Milton v. *State of Florida*, 40 Fla. 251, page 264:

"The Circuit Court must have failed to observe the distinction obtaining in the civil and criminal departments of the law in the application of the rule sought to be invoked in the charge. Mr. Bishop says (Vol. 1 Crim. Law, §208, 8th Edition) 'In civil jurisprudence we have the rule that when a man does a thing by permission of law—not by license, but by permission of law—and after proceeding lawfully part way, abuses the liberty the law had given him, he shall be deemed a trespasser from the beginning by reason of his subsequent abuse. *But this doctrine does not prevail in our Criminal jurisprudence; for no man is punishable criminally for what was not criminal when done, even though he afterwards adds either the act or intent yet not the two together.*' State *v.* Moore, 12 N. H. 42 and Commonwealth *v.* Tobin, 108 Mass. 426, S. C. 11 Am. Rep. 375 sustain the text."

The State v. *Moore*, 12 N. H. 42:

> "The prisoner therefore had the right to enter the inn and the bar room; and the question arises *whether the larceny committed in the bar room relate back and give a character to the entry into the house* so as to make it *criminal* and the prisoner punishable for it upon reasoning similar to which, in a civil action, could render him liable as a trespasser ab initio. Except the inference that may lawfully be made from the act of larceny there is *no evidence that he entered with any illegal purpose or a felonious intent.*" (p. 46)
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> • • • • • • •
>
> "To hold that for a lawful entry a party could be punished, because after such entry he does an unlawful act, would be to find him guilty of a crime by construction; a result which the law, in its endeavors always to ascertain the real intention of the accused invariably in theory avoids, and which has seldom in modern times happened in practice." (p. 49)

The doctrine of these cases finds peculiar application to the facts at hand. The indictment does not charge an illegal transportation. It concedes it to have been legal, but charges that two and one-half years after the transportation had taken place and the property had come to rest at its destination, and the full legal rate had been paid and the interstate commerce ceased, the defendants, on May 15, 1935 *solicited*, received and accepted a rebate. The charge of a first "unlawful" act is therefore as of May 15, 1935 (see Par. 5 of Count 1, and similar paragraphs in other Counts, fol. 3). Only by the doctrine of relation back, by the imputation of a criminal intent to a lawful transaction in the far past, already complete, can the Government begin to establish a crime committed

within the District. Such a doctrine is contrary to the authorities and has no application in a criminal case.

An effort was made in *N. Y. Central & H. R. R. Co. v. U. S.*, 166 Fed. 267, to justify jurisdiction upon a prior legal act. The Court refused to find jurisdiction, holding it could not be based upon a completed lawful act, followed by an unlawful act.

Conclusion

It is therefore clear that in order for the Court to take jurisdiction in a criminal matter it must be shown that the crime was committed within its jurisdiction. The Government throughout its brief does not dispute this axiom of law. It attempts to construe the Elkins Act so as to convert a completed legal act into an illegal act, and thereby obtain jurisdiction. That is the substance of its argument.

In the case under discussion the facts and the indictment disclose that the transportation was commenced and completed in 1932. The property came to rest in the State of New Jersey at that time, and the carrier's lawful charges were paid. It is conceded by the Government that there was neither an agreement nor an intent prior to or during the shipment of the merchandise to receive a rebate (Appellant's Brief, p. 9). We therefore find that the transportation up to and including the time interstate commerce ceased, was lawful. Some 2½ years thereafter, to wit: May 15, 1935, the appellees are charged in the indictment with having solicited and received a rebate. The bill of particulars discloses that the rebate was paid within the Southern District of New York.

The Government, in order to justify its indictment in the Eastern District of Pennsylvania attempts to link

the appellees' completed legal act of transportation in 1932 with the alleged solicitation and acceptance of a rebate at New York City on May 15, 1935, and thereby obtain jurisdiction. This of course it cannot do. What is it that these appellees did in the Eastern District of Pennsylvania in 1932 that might be construed as criminal or offensive to the Elkins Act? Certainly the conceded lawful transportation of the property through that District in 1932 cannot in any manner be construed to be violative of the Elkins Act. So that it cannot be said that any crime was committed by these appellees in the Eastern District of Pennsylvania in 1932. The only reference in the indictment to the commission of a crime fixes the date as May 15, 1935. It is charged in the indictment and the bill of particulars that on that date the appellees at the City of New York solicited and accepted a rebate in connection with the transportation which took place 2½ years previously. What did these appellees do on May 15th, 1935 at the City of New York which could be constructed to be an offense within the jurisdiction of the Eastern District of Pennsylvania?

It should be noted that the Government in its own bill of particulars established the locus of the crime at the City of New York. This of course was done by the Government before the demurrer herein was filed, and before the burden of proving jurisdiction in the Eastern District of Pennsylvania was cast upon it. If the Government at the time of filing its bill of particulars believed that jurisdiction was in the Eastern District of Pennsylvania, why did it specifically mention the City of New York as the place where the crime was committed?

Assuming, but not conceding that the Government's contention as to jurisdiction is correct, what would be the

effect of the following supposititious cases? Suppose these appellees, after the completion of the lawful transportation of the merchandise, had assigned their claims for property damage against the carrier to a third person. Assume that the third party thereafter filed false claims against the carrier. Would these appellees be subject to indictment under the Elkins Act? If the Government's contention be true, then the rebates paid to the third party would immediately taint the transportation with criminality, and since these appellees began and completed the transportation, they would be indictable, although their actions in the transaction were concededly lawful. Does that not seem absurd? On the other hand, if these appellees are not indictable, is it because they assigned their claims? Can one assign his criminal liability?

Assume further that the assignee had filed false claims in the City of New York, and received rebate there, could he be indicted in any district through which transportation had been conducted? The answer is obvious. It is therefore clear that the two acts mentioned in the indictment are separate and distinct—one, the transportation, which is admittedly legal and complete in itself, and the other, the alleged solicitation and receipt of a rebate, which is also a complete and independent act.

It follows therefore, that at no time can it be said that there was in the Eastern District of Pennsylvania, a continuous crime, and therefore within the law heretofore developed, venue could not be laid in the Eastern District of Pennsylvania. That is the reason why the Court struggled in the *Armour* cases, to find a continuous crime committed under the Elkins Act, by the *continuous illegal transportation*. If all that were necessary were the showing of a mere transportation irrespective of illegality

at the time of occurrence, the Court could well have disposed of the entire case by the mere assertion, that transportation had occurred within the district of trial and that was all that was needed under the Act. But this it did not do. It proceeded to find the transportation continuously illegal—that a crime was being continuously committed in each district of transportation. The only basis for the finding was the existence of an illegal agreement and payment of a rebate pursuant thereto prior to transportation.

We differ with the contention of the Government in its view of where the offense was committed. Conceding for the purpose of the argument that the result of obtaining transportation at an illegal rate is the offense defined by the Elkins Act, we submit that *the result* under the circumstances of this case, occurred, if at all, at the place of payment of the alleged rebate in the Southern District of New York. There it was produced, if produced at all, and did not emanate backwards into any other district. Acting there, the result was produced there. It was not known or felt elsewhere. The solicitation and acceptance of the rebate in New York City was the beginning and ending of the offense. (*New York Central R. R. Co.* v. *U. S.*, 212 U. S. 481; *Standard Oil Co. of Ind.* v. *U. S.*, 164 Fed. 376.)

The fear expressed by the Government (page 23—Brief) of possible evasion of the act by the payment of rebates without the territory of the United States is sufficiently answered by §102—*Offenses on the high seas or* ELSEWHERE (U. S. C. A., Title 28, Judicial Code, Sec. 41; R. S. §730; March 3, 1911 c. 231, §41, 36 Stat. 1100).

The error that the Government has fallen into is that it sought the indictment of these appellees under Title 49,

Section 41, subd. 1. The facts as alleged in the indictment and the bill of particulars indicate that the indictment might have properly been found under Title 49, Section 10, subd. 3, U. S. C. A. That subdivision of Section 10 specifically prohibits the obtaining of transportation at a less than regular rate by the use of false claims. Under that section, however, the Government would have been compelled to indict these appellees within the Southern District of New York. For reasons best known to the Government, it ignored this section which is applicable to the facts alleged in this case, and indicated within the Eastern District of Pennsylvania. Having erroneously initiated this case within that district, it is now attempting, by an arbitrary construction of Section 41 of Title 49, U. S. C. A. to hold jurisdiction of these appellees in that district.

That the entire case of the Government is based on the filing of alleged false claims is conclusively admitted in the bill of particulars (fol. 66) wherein appears the following question and answer:

> (3. Question) Why was it a rebate?
>
> 3. Answer. The Government contends that the Pennsylvania Railroad Company paid the loss and damage claim or claims filed against each carload shipment of Midstate Horticultural Company, Inc. without carrier liability for the alleged loss and damage, and that these claims were filed by the said Midstate Horticultural Company, Inc. and paid by the Pennsylvania Railroad Company as a convenient method of soliciting and granting a rebate or rebates."

It is respectfully submitted that the motion to dismiss for lack of jurisdiction be granted, and in the event that the aforesaid motion to dismiss is not granted, that the order of the court below sustaining the demurrer to the joint indictment should be affirmed.

Respectfully submitted,

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January, 1939.

Appendix

The pertinent provisions of the Elkins Act, Section 1, as amended, c. 3591, sec. 2, 34 Stat. 587 (U. S. C., Title 49, Sec. 41 (1)), read as follows:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, Sec. 1. That any thing done or omitted to be done by a corporation common carrier, subject to the Act to regulate commerce and the Acts amendatory thereof, which, if done or omitted to be done by any director or officer thereof, or any receiver, trustee, lessee, agent, or person acting for or employed by such corporation, would constitute a misdemeanor under said Acts or under this Act, shall also be held to be a misdemeanor committed by such corporation, and upon conviction thereof it shall be subject to like penalties as are prescribed in said Acts or by this Act with reference to such persons, except as such penalties are herein changed. The willful failure upon the part of any carrier subject to said Acts to file and publish the tariffs or rates and charges as required by said Acts, or strictly to observe such tariffs until changed according to law, shall be a misdemeanor, and upon conviction thereof the corporation offending shall be subject to a fine of not less than one thousand dollars nor more than twenty thousand dollars for each offense; and it shall be unlawful for any person, persons, or corporation to offer, grant, or give, or to solicit, accept, or receive any rebate, concession, or discrimination in respect to the transportation of any property in interstate or foreign commerce by any common carrier subject to said Act to regulate commerce and the Acts amendatory thereof whereby any such property shall by any device whatever be transported at a

less rate than that named in the tariffs published and filed by such carrier, as is required by said Act to regulate commerce and the Acts amendatory thereof, or whereby any other advantage is given or discrimination is practiced. Every person or corporation, whether carrier or shipper, who shall knowingly offer, grant, or give, or solicit, accept, or receive any such rebates, concession, or discrimination shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine of not less than one thousand dollars nor more than twenty thousand dollars: *Provided*, That any person, or any officer or director of any corporation subject to the provisions of this Act, or the Act to regulate commerce and the Acts amendatory thereof, or any receiver, trustee, lessee, agent, or person acting for or employed by any such corporation, who shall be convicted as aforesaid, shall, in addition to the fine herein provided for, be liable to imprisonment in the penitentiary for a term of not exceeding two years, or both such fine and imprisonment, in the discretion of the court. Every violation of this section shall be prosecuted in any court of the United States having jurisdiction of crimes within the district in which such violation was committed or through which the transportation may have been conducted; and whenever the offense is begun in one jurisdiction and completed in another it may be dealt with, inquired of, tried, determined, and punished in either jurisdiction in the same manner as if the offense had been actually and wholly committed therein. * * *